NO. 56601-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

REID JOHNSTON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY

The Honorable Keith Harper, Judge

BRIEF OF APPELLANT

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RULES, STATUTES, AND OTHER AUTHORITIES

A. INTRODUCTION

Police obtained a warrant to search appellant Reid Johnston's car for drugs and drug paraphernalia only. While searching, they found a holstered gun and searched it based solely on the fact that the gun was originally purple and had been painted black. The gun turned out to be stolen.

The search warrant—based primarily on probable cause for a crime determined to be void under State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021)—did not supply authority of law justifying the invasion of Mr. Johnston's private affairs. Because the search for drug paraphernalia was merely incidental to the search for drugs, the warrant was not severable and was therefore wholly invalid. Furthermore, the plain view doctrine could not justify the additional search of the firearm, because it was not immediately apparent to the police that they had found evidence of a crime.

The trial court thereafter violated Mr. Johnston's right to due process by accepting his guilty plea on multiple counts,

without his full understanding of the law in relation to the facts, rendering the plea involuntary. For these multiple reasons, this Court should reverse Mr. Johnston's convictions and remand for suppression of the firearm, as well as the opportunity for Mr. Johnston to withdraw his plea.

B. ASSIGNMENTS OF ERROR

1a. The trial court erred in refusing to suppress evidence discovered in Mr. Johnston's vehicle, contrary to article I, section 7 of the Washington Constitution and the Fourth Amendment of the United States Constitution. RP 74-75.

1b. The trial court erred in concluding authority of law to search could be based on the void crime of unlawful possession of a controlled substance. RP 74-75.

1c. The trial court erred in concluding use of drug paraphernalia was wholly independent of unlawful possession of a controlled substance and could therefore support probable cause to search. RP 74-75.

1d. The trial court erred in concluding it did not create a good faith exception to the exclusionary rule under article I, section 7. RP 75.

2a. The trial court erred in concluding the plain view doctrine authorized the search and seizure of the firearm found in Mr. Johnston's vehicle. RP 75-76.

2b. The trial court erred in concluding the firearm could also be searched under a so-called "safekeeping" exception to the exclusionary rule. RP 76.

2c. The trial court erred in finding the police knew at the time of the search whether Mr. Johnston could lawfully possess a firearm. RP 73.

3. The trial court violated Mr. Johnston's right to due process by accepting his guilty plea, where it was not knowing, intelligent, and voluntary.

4. The trial court erroneously imposed the $100 DNA collection fee in Mr. Johnston's judgment and sentence.

Issues Pertaining to Assignments of Error

1a. Did the trial court err in refusing to suppress evidence of a stolen firearm discovered in Mr. Johnston's car, where the warrant authorizing the search was based in large part on the void statute criminalizing unlawful possession of a controlled substance, which cannot supply the authority of law required by article I, section 7 of the Washington Constitution?

1b. Must evidence of the firearm be suppressed and Mr. Johnston's corresponding conviction reversed, where the remaining portion of the warrant related to use of drug paraphernalia was incidental to the overarching goal of searching for evidence of controlled substances, rendering the warrant not severable and therefore wholly invalid?

2. Must evidence of the firearm also be suppressed, because the plain view doctrine did not apply where the police did not have probable cause to believe they had discovered evidence of a crime and no other warrant exception authorized

the intrusion into Mr. Johnston's private affairs at the time of the search?

3. Must Mr. Johnston's convictions be reversed and Mr. Johnston be allowed to withdraw his guilty plea, where he did not possess an adequate understanding of the law in relation to the facts—specifically that both trafficking in and possession of stolen property (Counts 2 and 3) require knowledge that the property is stolen—and therefore did not enter a knowing, intelligent, and voluntary guilty plea?

4. Is remand necessary, where the trial court imposed the $100 DNA collection fee, even though the prosecution asked the court to "hold off" on imposing it because the prosecution had not determined whether Mr. Johnston previously provided a DNA sample?

C. STATEMENT OF THE CASE

1. Search of Mr. Johnston's Vehicle and Resulting Charges

On August 18, 2020, Deputy Alan Jorgensen was patrolling in Jefferson County when he saw a passenger car with a broken taillight. RP 6-7. He initiated a traffic stop. RP 7. Ashley Zarnke was driving and Reid Johnston was riding in the front passenger seat. RP 7-8. Mr. Johnston owned the vehicle and had a valid driver's license. RP 11-12, 29.

Ms. Zarnke admitted to Deputy Jorgensen that her licensed was suspended. RP 9. Deputy Jorgensen asked her to step out of the vehicle, preparing to arrest her. RP 9. As she got out, Deputy Jorgensen saw Ms. Zarnke move her head as if motioning to Mr. Johnston. RP 9. Deputy Jorgensen observed Mr. Johnston grab something off the driver's seat. RP 9.

Upon Deputy Jorgensen's instruction, Mr. Johnston eventually released the item, which turned out to be a piece of cellophane. RP 10. Deputy Jorgensen suspected the cellophane

might contain a small amount of drugs, and Ms. Zarnke later admitted it contained "a little bit of heroin." RP 10, 12. Wary of the situation, Deputy Jorgensen asked Mr. Johnston to step out of the vehicle. RP 10.

As Deputy Jorgensen continued his investigation, he noticed a piece of burnt tinfoil in the back seat, which he suspected contained heroin. RP 11. Mr. Zarnke admitted this heroin was hers, as well. RP 12.

Deputy Jorgensen arrested Ms. Zarnke and Mr. Johnston, who declined consent to search his vehicle. RP 12. Deputy Jorgensen seized the vehicle to apply for a search warrant. RP 12. As she was transported to jail, Ms. Zarnke told Deputy Jorgensen there was also methamphetamine inside a Point Casino bag in the car, but claimed it belonged to Mr. Johnston. RP 14.

Deputy Jorgensen applied for a search warrant, believing "[e]vidence of the crime(s) of RCW 69.50.4013 Possession of a controlled substance, RCW 69.50.412 Unlawful use of Drug

Paraphernalia" would be found in the vehicle. Ex. 5, at 1. A judge authorized the warrant, allowing a search for items "which show dominion and control of the vehicle" and "any drug paraphernalia." Ex. 5, at 5.

Deputy Jorgensen and Detective Jon Stuart executed the search warrant. RP 16-17. Deputy Jorgensen collected the cellophane, which contained heroin, and the burnt tinfoil. RP 18. In the center console, he located the Point Casino bag with the suspected methamphetamine in it. RP 18.

Detective Stuart searched the trunk of the car. RP 30-31. There, inside a "suitcase bag," Detective Stuart found a holstered pistol. RP 41. The serial number was not visible behind the holster. RP 42-43. Both Deputy Jorgensen and Detective Stuart knew Mr. Johnston had prior contact with the police. RP 23-24, 41. But neither of them confirmed Mr. Johnston's criminal history or knew whether Mr. Johnston could lawfully possess a firearm. RP 23-24, 37, 43.

Detective Stuart could tell from the visible part of the pistol grip that the gun was originally purple but had been spraypainted black. RP 39. Detective Stuart acknowledged that he, himself, has painted guns and also had guns professionally painted. RP 40. But, because the gun was "poorly painted," Detective Stuart suspected that it might be stolen. RP 40-41; see also RP 31 (Deputy Jorgensen).

Detective Stuart removed the gun from the holster to read the serial number. RP 31, 40-42. Detective Stuart explained he also removed the gun from its holster to "render the weapon safe," because they would not want to release the car to the tow company with a gun inside. RP 41-42. A search of the serial number revealed the firearm was stolen. RP 20. Upon this discovery, Deputy Jorgensen obtained an amended search warrant for the firearm. RP 20; Ex. 6.

Based on the results of the search, the prosecution charged Mr. Johnston with one count of possession of a stolen firearm and two counts of possession of a controlled substance.

CP 2. The latter two counts were dismissed following the supreme court's decision in Blake, which held Washington's simple drug possession statute, RCW 69.50.4013, violated due process and was therefore void. CP 22-23.

2. Trial Court's Denial of Mr. Johnston's Motion to Suppress Evidence

Defense counsel moved to suppress evidence of the stolen firearm on several grounds. CP 8-21. Relevant here, counsel argued that a void statute—unlawful possession of a controlled substance—could not provide probable cause to search Mr. Johnston's vehicle. RP 54-56; CP 18-20. Counsel emphasized there is no good faith exception to the exclusionary rule under our state constitution. RP 55.

Counsel further argued use of drug paraphernalia was effectively inseparable from possession of a controlled substance, and so the use statute was "equally void." RP 56-57. For instance, counsel pointed out, "it makes absolutely no sense

to say that a person can possess methamphetamine, but they can't possess a baggie containing methamphetamine." RP 56.

Defense counsel also contended the search of the firearm was unlawful under the plain view doctrine because it was not immediately apparent that the gun was evidence of a crime. RP 58-59; CP 15-16. Counsel emphasized neither Deputy Jorgensen nor Detective Stuart knew at the time of the search whether Mr. Johnston was a convicted felon and therefore not allowed to possess a firearm. RP 59. Therefore, they did not have probable cause to remove the gun from its holster. RP 58-59; CP 16.

After holding an evidentiary hearing, the trial court denied Johnston's motion to suppress evidence of the firearm. RP 5, 77.[1] The court ruled Deputy Jorgensen had probable cause to believe there was heroin and methamphetamine, as well as evidence of use of drug paraphernalia, in the car. RP

[1] The trial court made an oral ruling, but did not enter any written findings of fact and conclusions of law.

74-75. The court rejected the argument that reliance on the now-void simple possession statute created some kind of good faith exception to our state exclusionary rule. RP 75.

The court further concluded the search of the firearm was proper under the plain view doctrine. RP 75-76. The court reasoned the gun was "suspicious due to the paint job" and "possibly in the possession of what they thought at the time could be a convicted felon." RP 76. The court also concluded "the gun could be relevant to a possible sentence enhancement." RP 75. Finally, the court rule Detective Stuart appropriately removed the gun from its holster "to unload the gun to render it safe for safekeeping." RP 76.

3. Mr. Johnston's Guilty Plea and Motion to Withdraw His Plea

Mr. Johnston thereafter pleaded guilty to the possession of a stolen firearm (Count 1), along with consolidated charges for first degree trafficking in stolen property (Count 2) and first degree possession of stolen property (Count 3), in exchange for

the prosecution recommending a residential drug offender sentencing alternative (DOSA). CP 30-31, 35, 41. The trafficking charge arose from an allegation that Mr. Johnston removed and sold pieces of a maple tree on another's property. Supp. CP__ (Sub. No. 39, Supplemental Declaration of Probable Cause on Counts 2 and 3, at 2-3). The possession of stolen property charge arose from an allegation that Mr. Johnston had an excavator on his property that had been stolen from a construction site in a neighboring town. Supp. CP__ (Sub. No. 39, at 5-6).

Mr. Johnston acknowledged receipt of the amended information, which was filed at the same time as his guilty plea. CP 30-32, 41. But he did not state that he read or understood it, or that defense counsel reviewed it with him. CP 41; RP 80-81. The trial court did not review the amended information with Mr. Johnston at his plea colloquy. RP 81-86.

In his personal statement of guilt, Mr. Johnston admitted:

> On April 21, 2021 I possessed stolen property valued at more than $5,000. On Dec. 13, 2020 I sold stolen property. On Aug. 18, 2020 I possessed a stolen firearm I knew was stolen. All acts in Jefferson County, WA.

CP 41. He did not state that he knew the property he possessed and sold on Counts 2 and 3 was stolen. CP 41. The trial court did not review the elements of the offenses with Mr. Johnston at his plea colloquy. RP 85. The court reviewed only Mr. Johnston's personal statement of guilt and asked him, "Is that what you did?" which Mr. Johnston confirmed. RP 85. The court accepted Mr. Johnston's plea and found him guilty "[b]ased on [his] statement and plea." RP 86.

Before sentencing, Mr. Johnston moved to withdraw his guilty plea and new counsel was appointed. CP 51-54; RP 92-93. Mr. Johnston asserted he was denied effective assistance of counsel because his prior attorney refused to provide him with a copy of his discovery, leaving Mr. Johnston feeling ill-prepared to evaluate his case and decide whether to plead guilty. CP 52. Mr. Johnston was also not informed the total amount he would

owe in restitution before he pleaded guilty. CP 52. Ultimately, he felt pressured and rushed to plead guilty. CP 52.

The trial court denied Mr. Johnston's request to withdraw his guilty plea, finding, "there's nothing that demonstrates to me that this was anything but a voluntary, knowing, and intelligent plea." RP 109-10.

The trial court thereafter imposed a residential DOSA. CP 65; RP 116. Mr. Johnston timely appealed. CP 76.

D. ARGUMENT

1. The trial court should have suppressed the evidence discovered in Mr. Johnston's car, where probable cause for unlawful possession of a controlled substance, a void crime, did not supply authority of law to support the search warrant.

The trial court erred when it refused to suppress evidence of the stolen firearm discovered while searching Mr. Johnston's car for drugs and drug paraphernalia. A search warrant based primarily on probable cause for a crime that is void—never valid—did not supply the authority of law necessary to invade

Mr. Johnston's constitutionally protected privacy rights. Moreover, Deputy Jorgensen sought the warrant because he wanted to search for illegal drugs, which would have supported a felony conviction; any search for drug paraphernalia was incidental to that objective. The warrant therefore was not severable and was wholly invalid, requiring suppression of the evidence found while executing the warrant.[2]

A trial court's assessment of probable cause is a legal conclusion reviewed de novo. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). No deference is owed to a trial court's issuance of a warrant "where the [supporting] affidavit does not

[2] Two decisions from this Court's sister divisions have rejected arguments that Blake invalidated search warrants seeking evidence of drug possession. In re Pers. Restraint of Pleasant, 21 Wn. App. 2d 320, 339-41, 509 P.3d 295 (2022) (Div. 3); State v. Moses, __Wn.2d __, 512 P.3d 600 (2022) (Div. 1). This Court is not bound by either decision. In re Pers. Restraint of Arnold, 190 Wn.2d 136, 148, 410 P.3d 1133 (2018) (no doctrine of horizontal stare decisis). In any event, review has been sought in Moses; the supreme court will consider the Moses petition for review on October 11, 2022 under case number 101069-9.

provide a substantial basis for determining probable cause."[3] State v. Lyons, 174 Wn.2d 354, 363, 275 P.3d 314 (2012).

a. *A void crime cannot supply authority of law under article I, section 7 of the Washington Constitution.*

As a preliminary matter, where an appellant raises a challenge under article I, section 7 of Washington Constitution, as distinct from the federal constitution, this Court need not apply the factors under State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), to engage in an independent state law analysis. State v. Mayfield, 192 Wn.2d 871, 880-82, 434 P.3d 58 (2019). Instead, the relevant considerations are "the constitutional text, the historical treatment of the interest at stake as reflected in relevant

[3] As previously noted, the court did not enter written findings of fact and conclusions of law, as required by CrR 3.6(b). However, in such circumstances, appellate courts undertake review of the trial court's oral ruling. See, e.g., State v. Derri, __Wn.2d__, 511 P.3d 1267, 1275 n.8 (2022) (reviewing trial court's oral suppression ruling, even though the "the trial court did not explain which of the controverted facts it credited and did not distinguish between findings of fact and conclusions of law"). Here, at least, the court's findings of fact are clearly delineated from its conclusions of law. RP 70-74 (summarizing evidence), 74-77 (making legal ruling).

case law and statutes, and the current implications of recognizing" the interest. Id. at 881 (quoting State v. Chenoweth, 160 Wn.2d 454, 463, 158 P.3d 595 (2007)).

First considering the text of the provision, article I, section 7 specifies: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." "It is well-established that article I, section 7 provides greater protection of privacy rights than the Fourth Amendment." State v. Winterstein, 167 Wn.2d 620, 631, 220 P.3d 1226 (2009). While the Fourth Amendment merely prohibits "unreasonable searches and seizures," article I, section 7 prohibits any invasion of an individual's right to privacy without "authority of law." It "'recognizes an individual's right to privacy with no express limitations.'" Winterstein, 167 Wn.2d at 631-32 (quoting State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)).

Considering next Washington courts' historical and recent treatment of the provision—unlike its federal counterpart, Washington's exclusionary rule is "'nearly categorical.'"

Mayfield, 192 Wn.2d at 888 (quoting State v. Afana, 169 Wn.2d 169, 180, 233 P.3d 879 (2010)). By contrast, the federal exclusionary rule is focused on deterring unreasonable government action. Id. at 886-87.

Consistent with the purpose of Fourth Amendment, the United States Supreme Court has held the exclusionary rule should not apply when police have acted in "good faith." United States v. Leon, 468 U.S. 897, 918-20, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). "Good faith" refers to an officer's "'objectively reasonable reliance' on something that appeared to justify a search or seizure when it was made. Afana, 169 Wn.2d at 181 (quoting Herring v. United States, 555 U.S. 135, 142, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009)). "Thus, the federal 'good faith' exception is applicable when a search or seizure was unconstitutional but the police officer's belief that it was constitutional was objectively reasonable at the time." Id.

Washington has explicitly declined to adopt a good faith or reasonableness exception to article I, section 7 where the

government lacks authority of law for the intrusion. Afana, 169 Wn.2d at 184. "If evidence is illegally obtained then it must be suppressed, regardless of an officer's reasonable belief that his or her actions were lawful." Mayfield, 192 Wn.2d at 888.

Thus, under our state constitution, if the government has disturbed a person's private affairs, the question is not whether its agent behaved in an objectively reasonable manner, but simply whether they had "authority of law." Afana, 169 Wn.2d at 180. Courts accordingly use a two-step analysis to determine whether the government violated article I, section 7. State v. Villela, 194 Wn.2d 451, 458, 450 P.3d 170 (2019). The court first determines whether the action complained of constitutes a disturbance of the individual's private affairs. Id. If so, the court then considers whether authority of law justified the intrusion. Id.

On the first question, the search of a vehicle "unquestionably" constitutes a disturbance of private affairs under our state constitution. Afana, 169 Wn.2d at 176.

The next question is, then, there was authority of law for the search. Villela, 194 Wn.2d at 458. A valid search warrant would supply such authority. State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). But a search warrant may issue only upon a determination of probable cause. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Probable cause exists if the warrant affidavit establishes "a reasonable inference that a person is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." State v. Figueroa Martines, 184 Wn.2d 83, 90, 355 P.3d 1111 (2015).

Meanwhile, "[a] statute or ordinance which is void as being in conflict with a prohibition contained in the constitution is of no force and effect." City of Seattle v. Grundy, 86 Wn.2d 49, 50, 541 P.2d 994 (1975). In February of 2021, the Washington Supreme Court held the crime of unlawful possession of a controlled substance under former RCW 69.50.4013 violated due process and was void. Blake, 197 Wn.2d at 195. Where the supreme court declares a statute void,

all pending litigation must be decided according to the principle that the statute is void. See Grundy, 86 Wn.2d at 50 (dismissing prowling conviction, then on appeal, after analogous prowling ordinance declared void).

Consequently, unlike in a situation where a warrant's factual support later founders, the trial court here should have considered the warrant as if there was no such crime as unlawful possession of a controlled substance. The warrant, based on a void crime, lacked the requisite authority of law, and the ensuing search violated the state constitution.

The trial court nevertheless determined the principle set forth in Michigan v. DeFillippo, 443 U.S. 31, 99 S. Ct. 2627, 61 L. Ed. 2d 343 (1979), controlled. See RP 75 (citing State v. Potter, 156 Wn.2d 835, 132 P.3d 1089 (2006), which applied DeFillippo). DeFillippo held an arrest made in good faith reliance on a city ordinance, later declared unconstitutional, was valid. 443 U.S. at 37. In so holding, the DeFillippo Court

considered whether a reasonable police officer could conclude probable cause existed at the time of the arrest. Id.

Although DeFillippo discussed the Fourth Amendment, not article I, section 7, the Washington Supreme Court subsequently applied the DeFillippo rule to arrests stemming from a partially invalidated statute in Potter and State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006). In Afana, however, the court indicated the DeFillippo rule was limited and, in that case, could not operate to save an automobile search. 169 Wn.2d at 184.

The prosecution argued in Afana that the only difference between DeFillippo, Potter, Brockob, on one hand, and Afana's case, on the other, was "the nature of the legal authority relied upon by the officer"—i.e., pre-Arizona v. Gant case law instead of a statute.[4] Afana, 169 Wn.2d at 182. Thus, according to the

[4] In Afana, the vehicle passenger was arrested on an outstanding warrant. 169 Wn.2d at 174. A police officer searched the car incident to the passenger's arrest based on her presence in the car at the time of the traffic stop. Id. Before the

prosecution, the DeFillippo rule should apply, as it had in Potter and Brockob. Afana, 169 Wn.2d at 181-82.

Our supreme court rejected the prosecution's argument. Id. at 184. By citing cases merely analogous to the situation being considered, the prosecution had not met its burden of demonstrating the search was supported by authority of law or that an exception to the exclusionary rule applied. Id. at 183-84. Potter and Brockob involved misdemeanor arrests, permitted by statute; the arrests were held to be lawful based on the existence of probable cause even though the underlying misdemeanor

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case was final on appeal, the United States Supreme Court held in Arizona v. Gant, 556 U.S. 332, 351, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), that "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search[.]" Consistent with Gant, our supreme court held the search was not authorized because, although the warrant for the passenger's arrest gave the officer a valid basis for *arrest*, the law no longer authorized a warrantless *search* of the car. Afana, 169 Wn.2d at 178.

statutes were later found to be unconstitutional.[5] Brockob, 159 Wn.2d at 342; Potter, 156 Wn.2d at 840-43; see Afana, 169 Wn.2d at 184.

Which brings us to the final consideration, the current implications of recognizing the interest. Although this precise issue has not been decided by our state supreme court, Afana supplies the appropriate decision-making framework. This case involves probable cause to *search*, not probable cause to *arrest*, as Potter and Brockob did. An officer's prior belief about authority to search does not fit under the diminutive DeFillippo / Potter / Brockob authority to arrest umbrella.

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[5] Under former RCW 10.31.100(3)(e) (2000), police could arrest a person without a warrant if they had probable cause to believe the person was driving with a suspended license (DWLS). However, unlike the simple possession statute, former RCW 10.31.100(3)(e) (2000) was never declared void and the crime of DWLS was never invalidated. Potter, 156 Wn.2d at 841. Instead, the supreme court held another statute, former RCW 46.20.289 (2002), which authorized mandatory suspension of a driver's license following a failure to appear, pay, or comply with a traffic citation, without an opportunity for an administrative hearing, failed to provide adequate due process. Potter, 156 Wn.2d at 841 (discussing City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004)).

The tests for probable cause to arrest and probable cause to search overlap. But they are not identical. Probable cause for a search warrant exists if the supporting affidavit establishes "a reasonable inference that a person is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched." Figueroa Martines, 184 Wn.2d at 90. Critically, a search warrant must be particular, meaning the search must be circumscribed to the specific crime under investigation. State v. Riley, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993); see State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (recognizing broad condemnation for general warrants).

Probable cause to arrest exists when an officer is aware of facts or circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). At the time of arrest, the officer need not have evidence to prove each element of the crime. Id. The officer is required only to have knowledge of facts such that a reasonable

person would believe an offense was committed. Id. The officer might even subjectively believe a different crime was committed than the one for which probable cause, in fact, existed. State v. Huff, 64 Wn. App. 641, 646, 826 P.2d 698 (1992).

Thus, although the tests are similar, more precision is required for warrants, considering that the decisionmakers are judicial officers, not police officers in the field, and considering that warrants must be sufficiently specific.

As Afana made clear, DeFillippo, Potter, and Brockob looked at arrests (and what was known to the officer at the time of the arrest). Afana, 169 Wn.2d at 182-84. But the question here is whether authority of law supported the search. If it did not, the evidence must be suppressed. Id. at 184.

The trial court's conclusions demonstrate it believed the relevant question was whether the officers believed at the time that there was probable cause, with its built-in reasonableness consideration. RP 74-75. But this case is more like Afana because, like Afana, it involves a search. A search's validity is

reviewed for whether it was supported by authority of law. Afana, 169 Wn.2d at 176. It either was, or it was not. Because the relevant statute is void, it was not. Based on a logical extension of existing article I, section 7 jurisprudence, the trial court should have suppressed the evidence, giving effect to the holding of Blake that the prior drug possession statute is void.

Assuming for the sake of argument that this Court disagrees Afana mandates reversal for the reasons stated, this Court should reject the underlying DeFillippo rationale as inconsistent with article I, section 7. The DeFillippo rule, like other federal authority, is rooted in evaluation of whether a government agent's actions are reasonable or done in good faith. See Herring, 555 U.S. at 142; Afana, 169 Wn.2d at 181 (characterizing arrest in DeFillippo as "good faith reliance" on city ordinance). As the law has developed under our state constitution, a court's evaluation of authority of law must include whether there was probable cause to believe a valid, non-void crime was implicated. Cf. White, 97 Wn.2d at 109 (looking

askance at DeFillippo and indicating result is justifiable only if "one accepts the premise that the exclusionary rule is merely a remedial measure"). Washington appellate courts should take this opportunity to so hold.

In summary, the trial court should have suppressed evidence of the stolen firearm discovered in Mr. Johnston's vehicle, because the prior statute prohibiting unlawful possession of a controlled substance, a non-existent crime, could not supply authority of law.

b. *The portion of the warrant authorizing a search for drug paraphernalia was not severable.*

Because the void crime of simple possession did not supply authority of law, the question becomes whether the warrant's reference to the paraphernalia statute nonetheless supplied such authority. A search pursuant to an overbroad warrant, such as the one here, will only be upheld if the warrant is severable. If it is not, a trial court must suppress all its fruits. If this Court agrees, as it should, that those portions of the warrant

based on a now-void crime were invalid, the warrant was wholly invalid because it was not severable.[6]

The severability doctrine applies where portions of a warrant are legally infirm. State v. Higgs, 177 Wn. App. 414, 430, 311 P.3d 1266 (2013). A warrant may manifest one form of legal infirmity, overbreadth, where it fails to describe with particularity items for which probable cause exists. Id. at 426. A warrant is also overbroad if, as here, some portions are supported by probable cause and other portions are not. Id. Under the severability doctrine, if a meaningful separation cannot be made between the valid and invalid portions, all evidence seized pursuant to the partially overbroad warrant must be suppressed. Perrone, 119 Wn.2d at 556-59; Higgs, 177 Wn. App. at 430.

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[6] Defense counsel specifically did not argue severability below. RP 56-57. However, an appellant may raise a new legal argument related to a suppression motion for the first time on appeal where "[a]ll the facts necessary to adjudicate the claimed error are in the record on appeal." State v. Jones, 163 Wn. App. 354, 360, 266 P.3d 886 (2011). As demonstrated below, the factual record was adequately developed to answer the question of severability. See Neth, 165 Wn.2d at 182 (review of probable cause "is limited to the four corners of the affidavit").

"[S]everance is not available when the valid portion of the warrant is 'a relatively insignificant part' of an otherwise invalid search." Perrone, 119 Wn.2d at 557 (quoting In re Grand Jury Subpoenas Dated December 10, 926 F.2d 847, 858 (9th Cir. 1991)). "[T]here must be some logical and reasonable basis for the division of the warrant into parts which may be examined for severability." Id. at 560. In Perrone, the court held the warrant was not severable. Id. at 556. Yet, because the question of severability was not close, the court declined to offer specific guidelines to determine whether severability would be appropriate in another case. Id. at 557-62.

In Maddox, this Court, fleshing out the standard, held the severability doctrine will save portions of an overbroad warrant only when five requirements are met: (1) the warrant must have lawfully authorized entry into the premises; (2) the warrant must include one or more particularly described items for which there is probable cause; (3) the portion of the warrant that includes particularly described items, supported by probable cause, must

be significant compared to the warrant as a whole; (4) the searching officer must have found and seized the disputed items while executing the valid part of the warrant; and (5) the officer must not have conducted a general search in disregard of the warrant's scope. State v. Maddox, 116 Wn. App. 796, 807-08, 67 P.3d 1135 (2003).

In Higgs, a warrant authorized a search of items related to the possession of methamphetamine, including packaging, for which there was probable cause. 177 Wn. App. at 421-22, 427. But the warrant also authorized a search for items and records related to methamphetamine distribution, for which probable cause was lacking. Id. Based on a claim of ineffective assistance of counsel, the question became whether the portion of the warrant authorizing a search for methamphetamine was severable from the rest of the warrant. Id. at 430.

In dispute was the third requirement, whether the valid items—those described with particularity and for which there was probable cause—were "significant" in the context of the entire

warrant. Id. at 431-32. As for the third requirement, the court noted probable cause was lacking for most of the warrant's paragraphs. Id. at 432. Yet despite this, "the primary purpose of this warrant . . . was to search for methamphetamine. And probable cause supported the portion of the warrant authorizing the search for methamphetamine." Id. Thus, the third criterion was satisfied. Id. at 433.

Here, as in Higgs, the third Maddox criterion is at issue, but it leads to the opposite conclusion—that the warrant was not severable.

Deputy Jorgensen applied for a search warrant, requesting permission to search Johnston's car for "[e]vidence of the crime(s) of RCW 69.50.4013 Possession of a controlled substance, RCW 69.50.412 Unlawful use of Drug Paraphernalia" as well as "[c]ontraband, fruits of crime, or other things otherwise criminally possessed." Ex. 5, at 1.

Neither of the two listed crimes is considered a lesser offense of the other, but they overlap. Under former

RCW 69.50.4013(1) (2017), it was unlawful "to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of [their] professional practice, or except as otherwise authorized by this chapter." The crime, now void, was a felony. Former RCW 69.50.4013(2) (2017).

Under former RCW 69.50.412(1) (2019), it was unlawful for a person to use drug paraphernalia in a variety of ways, including to "store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance." The offense was a gross misdemeanor. Id.

Deputy Jorgensen asked permission to seize items related to dominion and control, and "[a]ny drug paraphernalia including but not limited to: baggies, pipes, bottles, scales, rolling papers, lighters, spoons, syringes, bongs, smoking pipes, razors, mirrors, steel wool, grinders, pill cutters, and film canisters." Ex. 5, at 4. The warrant found probable cause to believe the listed two crimes had been committed and that evidence of those crimes would be

found in the vehicle. Ex. 5, at 5. It authorized seizure of the items as listed in the affidavit. Ex. 5, at 5.

The warrant did not satisfy the third severability criterion. It was not severable, because the search for drug paraphernalia was incidental to a search for evidence of the drugs themselves. All specifically sought items were items used to ingest possessed drugs, rather than items used in production and processing. The presence of any controlled substance residue on such an object is relevant to a determination of whether an object is drug paraphernalia. RCW 69.50.102(b)(5). But residue also supports a conviction for unlawful possession of a controlled substance. State v. Rowell, 138 Wn. App. 780, 786, 158 P.3d 1248 (2007). Drug paraphernalia, although prohibited under another statute, would supply such evidence. The trial court itself acknowledged use of drug paraphernalia "involves both paraphernalia and substances." RP 74.

But the trial court failed to realize any search for drug paraphernalia was a relatively insignificant part of an otherwise

invalid search for evidence supporting the crime of unlawful possession of a controlled substance, that is, drugs. The probable cause to search for use of drug paraphernalia was based on the observed cellophane and burnt tinfoil. RP 10-11; Ex. 5, at 2-3. But both cellophane and tinfoil are readily available, commonly used household products. RP 57. Without a search to determine whether these items contained controlled substances, there could be no evidence of use of drug paraphernalia.

Under the circumstances, the third Maddox criterion was not satisfied. In Higgs, even where the warrant authorized a search for a lengthier list of items, it was clear that the primary purpose of the warrant was a search for methamphetamine. 177 Wn. App. at 432. This rationale also applies here, although, as stated, it produces a different outcome than in Higgs. The warrant was not severable, rendering the search wholly invalid.

This Court should remand for suppression of the stolen firearm, discovered while executing the invalid search warrant. Because Mr. Johnston pleaded guilty to possession of a stolen

firearm as part of a "package deal," he should be allowed to withdraw his plea on all three counts, if he chooses. State v. Turley, 149 Wn.2d 395, 400, 69 P.3d 338 (2003).

2. **The trial court should have suppressed evidence of the firearm in Mr. Johnston's trunk because the police did not have probable cause to search it under the plain view doctrine.**

The search of the firearm in Mr. Johnston's trunk, by removing it from its holster to view the serial number, was unlawful under the plain view doctrine because the officers did not have probable cause to believe the firearm was evidence of a crime. The only information the officers had at the time was the gun was originally purple and had been painted black. Because the prosecution failed to establish any other warrant exception justified the intrusion into Mr. Johnston's private affairs, evidence of the firearm must be suppressed.

When reviewing the denial of a suppression motion, appellate courts must determine whether substantial evidence supports the challenged findings of fact and whether the

findings support the conclusions of law. State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Evidence is substantial when it is enough 'to persuade a fair-minded person of the truth of the stated premise.'" Id. (quoting State v. Reid, 98 Wn. App. 152, 156, 988 P.2d 1038 (1999)). Conclusions of law are reviewed de novo, as are probable cause determinations. Id.; Neth, 165 Wn.2d at 182.

a. *Removing the gun from its holster constituted an additional search beyond the scope of the warrant*.

The trial court made no express conclusion as to whether removing the gun from its holster was a search that intruded into Mr. Johnston's private affairs. See RP 75-76. Case law makes clear that it was.

The seminal case of Arizona v. Hicks, 480 U.S. 321, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987), controls. There, the police were lawfully in the Hicks's apartment based on exigent circumstances. Id. at 324. While inside, an officer noticed expensive-looking stereo equipment that seemed out of place in

the otherwise squalid apartment. Id. at 323. Suspecting the equipment was stolen, the officer moved some of the stereo components to read and record the serial numbers. Id.

The Hicks Court recognized the "mere recording of serial numbers" does not constitute a seizure. Id. at 324; see also State v. Haggard, 9 Wn. App. 2d 98, 113, 442 P.3d 628 (2019) ("Recording serial numbers that are in plain view does not constitute a search or seizure"), aff'd, 195 Wn.2d 544, 461 P.3d 1159 (2020). However, the Hicks Court held, the officer's "moving of the equipment" constituted a search separate and apart from the search justified by exigent circumstances. 480 U.S. at 324-25. The Court explained, "taking action, unrelated to the objectives of the authorized intrusion, which exposed to view concealed portions of the apartment or its contents, did produce a new invasion of respondent's privacy unjustified by the exigent circumstance that validated the entry." Id. at 325.

Here, the officers were executing a search warrant for drugs and drug paraphernalia when they discovered the

holstered gun in the trunk of Mr. Johnston's car. RP 21, 41. Because of the holster, the serial number was not visible. RP 42-43. Nor could the officers tell whether the gun was loaded. RP 19, 42, 73. Similar to Hicks, they had to remove the gun from its holster to read the serial number. RP 31, 40-42. This additional action fell outside the scope of the authorized intrusion—a search for drugs and drug paraphernalia—and therefore amounted to a "new invasion" of Johnston's privacy. Hicks, 480 U.S. at 325.

b. *The search of an item under the plain view doctrine must be supported by probable cause.*

Because removing the gun from its holster was a search beyond the scope of the warrant, the next question is whether that additional search was justified under the plain view doctrine. The plain view doctrine applies when police (1) have a valid justification to be in an otherwise protected area and (2) are immediately able to recognize the evidence they see is associated with criminal activity. State v. Morgan, 193 Wn.2d

365, 370, 440 P.3d 136 (2019). "Objects are immediately apparent when, considering the surrounding circumstances, the police can reasonably conclude that the [item] before them is incriminating evidence." State v. Hudson, 124 Wn.2d 107, 118, 874 P.2d 160 (1994).

Probable cause is required to search or seize an item under the plain view doctrine. Hicks, 480 U.S. at 326-28. Reasonable suspicion is not enough. Id. at 326. This is so because the plain view doctrine necessarily involves "nonpublic places such as the home, where searches and seizures without a warrant are presumptively unreasonable." Id. at 326-27.

While probable cause does not require "absolutely certainty," State v. Hatchie, 161 Wn.2d 390, 404, 166 P.3d 698 (2007), it does require "more than suspicion or conjecture," State v. Ruem, 179 Wn.2d 195, 202, 313 P.3d 1156 (2013). "It requires facts and circumstances that would convince a reasonably cautious person." Id. at 202. In evaluating whether probable cause supports a search, "the focus is on what was

known at the time the warrant issued, not what was learned afterward." Chenoweth, 160 Wn.2d at 476.

Thus, if "the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object—*i.e.*, if 'its incriminating character [is not] immediately apparent,' the plain-view doctrine cannot justify its seizure." Minnesota v. Dickerson, 508 U.S. 366, 375, 113 S. Ct. 2130, 124 L. Ed. 2d 334 (1993) (alteration in original) (quoting Horton v. California, 496 U.S. 128, 136, 110 S. Ct. 2301, 110 L. Ed. 2d 112 (1990)).

Mr. Johnston maintains the first prong of the plain view doctrine—a valid justification to be in an otherwise protected area—is not met because the search warrant was wholly invalid, for the reasons discussed above in Argument 1. But, for the sake this argument, Mr. Johnston assumes the search warrant

was valid and the police were therefore justified in searching the trunk of his vehicle.[7]

c. *Probable cause was lacking in Mr. Johnston's case, where it was not immediately apparent to the officers that they had found evidence of a crime.*

Under the second prong of the plain view doctrine, the question is whether there was probable cause to believe the gun was evidence of a crime *before* removing it from its holster. The trial court cited three reasons it concluded this standard was met, which will be addressed in turn. RP 75-76.

First, the trial court concluded the gun was "possibly in the possession of what they thought at the time could be a convicted felon." RP 76. The court made a related finding of

[7] Below, the trial court indicated Hicks might be distinguishable because it involved a warrant exception (exigent circumstances) rather than a warrant. RP 50, 76. But this is not a relevant distinction. The police must have a valid reason to be in the protected area—whether through a warrant or a warrant exception, the test is the same. See, e.g., State v. Johnson, 104 Wn. App. 489, 501-02, 17 P.3d 3 (2001) (analyzing plain view where there was a warrant); State v. Murray, 84 Wn.2d 527, 535, 527 P.2d 1303 (1974) (same where there was consent exception).

fact that "[t]he Detective also indicated that the other officer believed at the time that -- that the Defendant was a convicted felon." RP 73.

A firearm, in an of itself, is not contraband or evidence of a crime. U.S. CONST. amend. II; United States v. Gray, 484 F.2d 352, 355 (6th Cir. 1973). Probable cause may arise, however, when the police are aware an individual cannot lawfully possess a firearm. See, e.g., State v. Bustamante-Davila, 138 Wn.2d 964, 982, 983 P.2d 590 (1999) (police knew defendant was both an undocumented non-citizen and a convicted felon, and therefore could not lawfully possess a firearm); United States v. Folk, 754 F.3d 905, 912 (11th Cir. 2014) ("A firearm that reasonably appears to be in the possession of a convicted felon qualifies as contraband—and is therefore subject to seizure under the plain view doctrine.").

However, contrary to the trial court's finding, the officers did not know whether Mr. Johnston could lawfully possess a firearm at the time they removed the gun from its holster.

Detective Stuart testified, "I think I asked Deputy Jorgensen if Mr. Johnston was a convicted felon. He said that he believed he was; he thought he had gone to prison, but wasn't a hundred percent sure." RP 41. But Detective Stuart twice admitted he was "not familiar" with Mr. Johnston's criminal history. RP 37, 43.

Deputy Jorgensen, too, admitted he never checked Mr. Johnston's criminal history. RP 23. While he knew Mr. Johnston had prior contacts with the police, Deputy Jorgensen "could not say for sure" whether Mr. Johnston's history included felonies or just misdemeanors. RP 23-24. He conceded, "[a]t the time, I couldn't have given specifics." RP 23. Ultimately, he acknowledged, he did not know whether Mr. Johnston could lawfully possess a firearm. RP 24. Deputy Jorgensen therefore could not have supplied the information to Detective Stuart that Mr. Johnston was a convicted felon. See State v. Mance, 82 Wn. App. 539, 542, 918 P.2d 527 (1996) (fellow officer rule does not cure lack of probable cause).

Without either officer knowing or confirming Mr. Johnston's criminal history, it was pure conjecture that he could not lawfully possess the firearm in his trunk. Probable cause must be based on what was known to the officers at the time. Chenoweth, 160 Wn.2d at 476. The trial court's finding is not supported by substantial evidence. That incorrect finding, in turn, cannot support the trial court's conclusion that Mr. Johnston "possibly" being a convicted felon gave rise to probable cause. RP 76.

Second, the trial court concluded the gun "was suspicious due to the paint job." RP 75; see also RP 76 (same). Detective Stuart testified he could tell the pistol grip was originally purple but had been spraypainted black. RP 39. Both officers testified the spray paint was "suspicious." RP 31, 40. Detective Stuart explained the spray paint could be a means to alter the appearance of the gun and conceal its identity. RP 40-41.

At most, however, this established reasonable suspicion that the gun was stolen, not probable cause. In the officers'

own words, the spray painting was *suspicious*. They did not testify they had probable cause to believe the gun was stolen merely because of the color change.

Painting a gun is not illegal. RP 40. No illegal alterations were visible. Compare RP 40-42, with State v. Carter, 151 Wn.2d 118, 122-23, 126-27, 85 P.3d 887 (2004) (illegal modifications to gun were immediately apparent), and RCW 9.41.140 (making it illegal to remove the serial number on a gun). By Detective Stuart's own testimony, painting guns is not even unusual. RP 40. He has both painted guns himself and had guns professionally painted. RP 40. Detective Stuart noted this particular paint job was not a "professional" one, which could simply indicate lack of financial means. RP 40. Purple is, perhaps, not the most desirable color for a gun. The paint job might indicate a stolen gun, but it might also indicate the owner simply does not want a *purple* gun.

Ex. 1 (gun after removal from its holster).

Contrasting case law is useful to consider. In State v. O'Neill, 148 Wn.2d 564, 583, 62 P.3d 489 (2003), for instance, the contraband nature of the item was obvious. The officer observed a spoon on the floorboard of O'Neill's vehicle. Id. at 572. A substance on the spoon looked granular and slick, consistent with being a "cook spoon" for ingesting narcotics. Id. When asked about it, O'Neill made the unlikely claim that it was an ice cream spoon. Id. These factors, taken together,

constituted probable cause to believe the spoon was drug paraphernalia, and so it was admissible under the plain view exception. Id. at 583; see also State v. Lair, 95 Wn.2d 706, 716-17, 630 P.2d 427 (1981) (probable cause to believe packet contained drugs, where type of packaging was a common way to store drugs, coupled with fact that it was found on shelf with another controlled substance).

Conversely, in Neth, plastic baggies were not necessarily indicative of criminal activity, even when combined with nervousness, inconsistent statements, and a large sum of money in the car. 165 Wn.2d at 185. The court emphasized "[b]aggies are capable of use for lawful as well as unlawful purposes." Id. The court held that more is required for probable cause than odd, even suspicious circumstances. Id. at 184-85.

Here, officers had the single fact that the originally purple gun had been painted black, which is neither illegal nor necessarily indicative of a crime. While the officers' suspicions were aroused, as Hicks clearly holds, reasonable suspicion is

not enough to allow for a plain view search. Probable cause was required and was lacking.

Third, the trial court concluded "the gun could be relevant to a possible sentence enhancement, as of the time of the search and depending upon what ultimately was charged or could be charged and/or what, if anything, the Defendant may have -- may have ultimately or eventually been found guilty of." RP 75; see also RP 51 (prosecution advancing this argument). The court did not make any related finding of fact. RP 70-73. This is not surprising, because neither Detective Stuart nor Deputy Jorgensen testified to this as a basis for searching the gun. The court's conclusion is therefore not supported by any finding of fact, nor could it be. See Chenoweth, 160 Wn.2d at 476 (inquiry must be limited to what was known at the time). "In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue." State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

Even if this Court entertains the trial court's unsupported conclusion of law, contrary to Armenta, the case law quickly demonstrates the "sentence enhancement" theory did not give rise to probable cause. A felony sentence may be enhanced if the accused was armed with a firearm at the time of the offense. RCW 9.94A.533(3); State v. Gurske, 155 Wn.2d 134, 137, 118 P.3d 333 (2005). To establish an individual was "armed" for purposes of a firearm enhancement, the prosecution must prove "(1) that a firearm was easily accessible and readily available for offensive or defensive purposes during the commission of the crime and (2) that a nexus exists among the defendant, the weapon, and the crime." State v. Sassen Van Elsloo, 191 Wn.2d 798, 828, 425 P.3d 807 (2018).

There is no dispute that probable cause does not require proof beyond a reasonable doubt. However, the firearm in question was so far from meeting this legal standard that neither was probable cause satisfied.

In Gurske, the accused was not "armed," where the pistol was in a zipped backpack behind the driver's seat, with an item on top of it, and the backpack was not removable without exiting the truck or moving to the passenger seat. 155 Wn.2d at 142. By contrast, in Sassen Van Elsloo, the accused was "armed," where the shotgun was positioned so it could be easily grabbed by anyone entering the car, it was less than a foot from a backpack containing drugs, and there was significant evidence of an ongoing drug dealing operation. 191 Wn.2d at 830-31; see also State v. Henry, 36 Wn. App. 530, 533, 676 P.2d 521 (1984) (guns lawfully seized where it was immediately apparent they were part of drug dealing operation).

There is even less here than in Gurske. Police found drugs (heroin in the cellophane and methamphetamine in the Point Casino bag) and drug paraphernalia (burnt tinfoil) only in the passenger compartment of the vehicle. RP 11, 18. There was no evidence of drug dealing or drug quantities that suggested anything but personal use. The gun, by contrast, was

found holstered, inside a bag in the trunk, inaccessible by the driver or the passenger. RP 41-43. There was no evidence that a person could reach the gun without exiting the vehicle and opening the trunk. It was not found close to any drugs or items used for drug dealing. There is simply no indication Mr. Johnston was "armed," as defined by law, at the time he allegedly possessed the controlled substances.

The prosecution bears the burden of proof at a suppression hearing. Armenta, 134 Wn.2d at 14. It failed to carry that burden, where it did not secure a finding that the officers removed the gun from its holster to investigate a possible firearm enhancement. See id. Any such testimony, moreover, could not supply probable cause, because the gun was nowhere close to the drugs and was not accessible by Mr. Johnston while riding in the front passenger seat.

The above discussion demonstrates the trial court erred in concluding there was probable cause to justify removing the

gun from its holster to read the serial number. The search of the gun was not permitted under the plain view doctrine.

d. *Because no other warrant exception applies without invoking the inevitable discovery doctrine—invalid under our state constitution—the firearm must be suppressed*.

Finally, apart the plain view doctrine, the trial court concluded the search of the gun was also lawful because "the Officer wanted to unload the gun to render it safe for safekeeping and to take it into custody, if appropriate." RP 76. Detective Stuart testified he removed the gun from its holster "to render the weapon safe," explaining, "[i]f we were to release the car to the two companies, they don't want guns in there." RP 42. Detective Stuart further explained, "[r]egardless if Mr. Johnston was a felon or not, we would likely take the gun for safekeeping." RP 42.

Neither the prosecution nor the court identified any specific warrant exception, or cited any authority, justifying an intrusion for purported "safekeeping" or tow facilitation. The

Washington Supreme Court has recognized warrant exceptions for consent, exigent circumstances, searches incident to valid arrest, inventory searches, plain view, and investigative stops. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). Washington courts "jealously guard these exceptions lest they swallow what our constitution enshrines." State v. Day, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007). The prosecution bears the "heavy burden" of proving one of the limited exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999).

The only possible exception appears to be the inventory search exception, which occurs when "an inventory of the contents of the automobile preparatory to or following the impoundment of the car" is carried out. State v. Montague, 73 Wn.2d 381, 385, 438 P.2d 571 (1968). Such a search "is made for the justifiable purpose of finding, listing, and securing from loss, during the arrested person's detention, property belonging to him." Id. Significantly, however, the property owner must

be allowed to decline the protection of the inventory search, "preferring to take the chance that no loss will occur." State v. Williams, 102 Wn.2d 733, 743, 689 P.2d 1065 (1984).

Deputy Jorgensen and Detective Stuart were not conducting an inventory search. The record indisputably shows this. They entered the vehicle pursuant to a warrant authorizing a search for drugs and drug paraphernalia. Ex. 5, at 5-6. They did not enter it for the purpose of finding, listing, and securing the contents of the vehicle from loss.

Perhaps the officers would have secured the firearm in an eventual inventory search before turning the vehicle over to the tow company. But this is speculation that invokes the inevitable discovery doctrine. The inevitable discovery doctrine requires the prosecution to demonstrate the evidence "ultimately or inevitably would have been discovered using lawful procedures." O'Neill, 148 Wn.2d at 591.

Significantly, however, the Washington Supreme Court has found the doctrine incompatible with article I, section 7,

because it is "necessarily speculative and does not disregard illegally obtained evidence." Winterstein, 167 Wn.2d at 634. Put another way, "[t]he State seeks to admit evidence that it claims the police would have discovered notwithstanding the violation of the defendant's constitutional rights." Id. Thus, the prosecution cannot justify a search where authority of law was lacking at the time of the search.

There is no "safekeeping" exception to the warrant requirement beyond the strict confines of an inventory search. The gun was not discovered in the course of an inventory search. Our state constitution does not allow this Court to presume the officers would have inevitably discovered the gun was stolen in a subsequent inventory search. The trial court therefore erred in concluding "safekeeping" permitted the intrusion into Mr. Johnston's private affairs. Because the search of the firearm was unlawful, suppression is required. Ladson, 138 Wn.2d at 360. As discussed in the argument above, Mr. Johnston should be

allowed to withdraw his plea on remand, if he so chooses. State v. Turley, 149 Wn.2d at 400.

3. **Mr. Johnston's guilty plea was not knowing, intelligent, and voluntary, necessitating reversal, where the record fails to disclose Johnston's understanding of the law in relation to the facts on Counts 2 and 3.**

The record fails to affirmatively show Mr. Johnston understood the relationship of his conduct to the elements of the charged offenses. Specifically, the record does not demonstrate Mr. Johnston understood he needed to know the property was stolen in order to be guilty of both trafficking in stolen property (Count 2) and possession of stolen property (Count 3). Under the circumstances, Mr. Johnston is entitled to withdraw his guilty plea because it was not knowing, intelligent, and voluntary.

Due process requires that a guilty plea be voluntary, knowing, and intelligent. State v. R.L.D., 132 Wn. App. 699, 705, 133 P.3d 505 (2006). "A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements." Id. "At a minimum,

'the defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime."' State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984) (quoting In re Pers. Restraint of Keene, 95 Wn.2d 203, 207, 622 P.2d 360 (1980)).

"When a defendant pleads guilty after receiving a charging document that accurately describes the elements of the offense charged, their plea is presumed to be knowing, voluntary, and intelligent." State v. Snider, __Wn.2d__, 508 P.3d 1014, 1020 (2022). That presumption is rebutted, however, if the record does not "affirmatively show" the accused "understood the law in relation to the facts." State v. S.M., 100 Wn. App. 401, 415, 996 P.2d 1111 (2000); accord State v. A.N.J., 168 Wn.2d 91, 119, 225 P.3d 956 (2010) (finding due process violation where the record did not "affirmatively disclose" this understanding).

"Without an accurate understanding of the relation of the facts to the law, a defendant is unable to evaluate the strength of the State's case and thus make a knowing and intelligent guilty

plea." R.L.D., 132 Wn. App. at 705-06. A guilty plea, therefore, "cannot be truly voluntary" unless the accused possesses this understanding. McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969).

In S.M., for instance, the prosecution charged S.M. with three counts of first degree child rape, alleging S.M. had sexual intercourse with his younger brother. 100 Wn. App. at 403. S.M. signed a statement on plea of guilty admitting he had "sexual contact" with his brother three times. Id. This statement did indicate S.M.'s understanding that the charged crimes required penetration. Id. at 415. At S.M.'s plea colloquy, the court asked S.M. only a "yes" or "no" question whether he knew the meaning of "sexual intercourse," but not what S.M. thought it meant or how it related to the charges against him. Id.

The S.M. court emphasized "[t]he plea statement is a critical indicator of S.M.'s understanding about the nature of the charges," id., notwithstanding the "strong presumption" of voluntariness, id. at 414. The court held S.M.'s right to due

process was violated "[b]ecause the record does not affirmatively show that S.M. understood the law in relation to the facts or entered the plea intelligently and voluntarily," particularly where the record showed S.M. also did not have "the full assistance of counsel before entering his plea." Id. at 415.

By contrast, in Snider, the record established Snider understood the requisite element of knowledge when he pleaded guilty to failure to register as a sex offender. 508 P.3d at 1023. There, the record of pretrial proceedings indicated some initial confusion on Snider's part. Id. at 1022. Snider's statement of guilt was mostly typed and originally omitted the word "knowingly." Id. at 1019. Crucially, however, Snider amended the plea statement with the help of counsel, adding the word "knowingly" by hand and initialing the change. Id. This handwritten addition "provide[d] a particularly persuasive indicator that the knowledge element was accurately conveyed" and understood. Id. at 1022. "Without that addition," the court

emphasized, "Snider's statement of guilt would not have been complete." Id.

Moreover, throughout pretrial proceedings, the trial court correctly described the knowledge element of the offense. Id. The court accurately recited the knowledge element again at Snider's plea colloquy, reading directly from Snider's statement of guilt. Id. Together, all these circumstances established Snider understood "the elements and nature of the crime of failure to register," making his plea knowing, voluntary, and intelligent. Id. at 1023.

Here, the record fails to affirmatively show Mr. Johnston understood the law in relation to the facts on Count 2, trafficking in stolen property, and Count 3, possession of stolen property. Specifically, the record does not reveal Mr. Johnston's understanding that he needed to know the property was stolen in order to constitute those charged crimes.

Knowledge is an essential element of both trafficking in stolen property and possession of stolen property. A person is

guilty of first degree trafficking in stolen property if he "*knowingly* initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others" or "*knowingly* traffics in stolen property." RCW 9A.82.050(1) (emphasis added). Possession of stolen property means "*knowingly* to receive, retain, possess, conceal, or dispose of stolen property *knowing* that it has been stolen." RCW 9A.56.140(1) (emphasis added). Thus, both offenses require that the accused know the property is stolen. Id.; State v. Killingsworth, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012).

The amended information in Mr. Johnston's case accurately alleged the element of knowledge for both Count 2 and Count 3. CP 31. Mr. Johnston agrees this gives rise to a presumption that his plea was knowing, intelligent, and voluntary. Snider, 508 P.3d at 1020. However, as in S.M., Mr. Johnston's subsequent statement of guilt and the remaining record demonstrate he did not have a full understanding that

Counts 2 and 3 required his knowledge that the property was stolen, rebutting the presumption of voluntariness.

In his statement on plea of guilty, Mr. Johnston acknowledged he was charged with first degree trafficking in stolen property and first degree possession of stolen property. CP 32. The statement, however, did not specify the elements of those offenses, instead referring only to the amended information. CP 32 ("The elements are: See Amended Information."). Critically, the amended information was filed the same day as Mr. Johnston's plea statement, September 24, 2021, both at 11:06 a.m. CP 30, 32. Mr. Johnston acknowledged in his plea statement that he "received a copy of that Information." CP 41. But the plea did not state whether Mr. Johnston read the amended information, understood it, or reviewed it with his attorney. CP 41; In re Pers. Restraint of Taylor, 31 Wn. App. 254, 258, 640 P.2d 737 (1982) ("The defendant's understanding of the nature of the charges against him is assured by his acknowledgment that he

received a copy of the information *and that he read and understood it*." (emphasis added)).

Mr. Johnston personal statement of guilt read, in its entirety: "On April 21, 2021 I possessed stolen property valued at more than $5,000. On Dec. 13, 2020 I sold stolen property. On Aug. 18, 2020 I possessed a stolen firearm I knew was stolen. All acts in Jefferson County, WA." CP 41. Like the plea statement in S.M. and the original incomplete statement in Snider, Mr. Johnston's plea statement omitted the essential element that he *knew* the property was stolen when he allegedly trafficked and possessed it. CP 41. Mr. Johnston's incomplete statement establishes he did not have a full understanding that, without knowledge that the property was stolen, his conduct related to Counts 2 and 3 was not criminal.

The omitted knowledge element on Counts 2 and 3 can be contrasted with Count 1, possession of a stolen firearm, with notably contains the requisite knowledge element. CP 41. This salient fact further indicates Mr. Johnston did not have a full

understanding that he needed to know the property was stolen to be guilty of Counts 2 and 3.

Nothing in the record thereafter established Mr. Johnston understood how his admitted conduct failed to satisfy the elements of the offenses. At the plea colloquy, defense counsel informed the court that he reviewed the plea statement with Mr. Johnston, but not the amended information. RP 80-81. Counsel did not represent that Mr. Johnston understood the elements of Counts 2 and 3, only that "I believe he understands the terms of the plea agreement and the constitutional rights that he's giving up and he's willingly and voluntarily doing so." RP 81.

The trial court similarly confirmed only that Mr. Johnston had a chance to read through his plea statement, which Mr. Johnston confirmed. RP 81. Unlike the court in Snider, the court in Mr. Johnston's case did not recite the elements of the offenses or inquire whether Mr. Johnston understood them. RP 81-86. Nor did the court read the amended information or confirm whether Mr. Johnston read and understood it. RP 81-86.

Instead, the court read only Mr. Johnston's personal statement of guilt, which omitted the two knowledge elements, and asked, "Is that what you did?" RP 85. The court thereafter accepted Mr. Johnston's guilty plea on each count and found him guilty, "[b]ased on your statement and plea." RP 86. Thus, nothing in Mr. Johnston's colloquy with the court demonstrates any understanding that he needed to know the property was stolen for both Counts 2 and 3.

The prosecution may try to distinguish S.M. on the basis that S.M. was a juvenile and received egregiously inadequate advice prior to entering his plea. S.M., 100 Wn. App. at 411-12. There is no dispute that the facts of S.M. are unusual, although unfortunately not unique. See generally A.N.J., 168 Wn.2d 91.

But the record in Mr. Johnston's case does demonstrate he felt unprepared and rushed into pleading guilty. In his motion to withdraw his plea, Mr. Johnston averred that defense counsel never provided him a copy of his discovery despite his multiple requests. CP 52. This left Mr. Johnston feeling unprepared, with

"no opportunity to refute the validity of any charges and/or evidence against me." CP 52. Mr. Johnston repeatedly expressed to his attorney that he was not guilty of the charges, but "was left with the impression that he either did not believe me or simply didn't care." CP 52. Instead, Mr. Johnston "felt pressured to hurry up and take the first plea offer from the prosecutor," particularly after Mr. Johnston ran out of money. CP 52. He either "needed to come up with more [money] or take the deal." CP 52.

While this record does not rise to the level of incompetence found in S.M. or A.N.J., it does corroborate the conclusion that Mr. Johnston pleaded guilty to Counts 2 and 3 without a full understanding of the nature of the charges against him. Because the record does not affirmatively disclose that Mr. Johnston understood he needed to know the property was stolen to constitute the crimes charged in Counts 2 and 3, the trial court violated his right to due process when it accepted his plea. A.N.J., 168 Wn.2d at 119; S.M., 100 Wn. App. at 415.

This Court should reverse Mr. Johnston's convictions and remand with instructions that Mr. Johnston be allowed to withdraw his plea, if he chooses. A.N.J., 168 Wn.2d at 119.

4. **Remand is necessary because the trial court imposed the $100 DNA fee without proof as to whether Mr. Johnston's DNA had previously been collected.**

At sentencing, the prosecution told the court, "we can hold off" on imposing the $100 DNA collection fee. RP 114. The prosecutor explained, "I know he has prior felony convictions. I did not double-check yet to see if that prior DNA sample shows up on his NCIC." RP 114. The trial court thereafter imposed only "the LFOs at the mandatory minimums." RP 116.

Despite the prosecution's request to "hold off" on the DNA fee, the judgment and sentence imposed it: "$100.00 DNA collection fee (Mandatory)." CP 66. This appears to be a clerical error, warranting remand for the court to strike the erroneously imposed $100 DNA fee. See State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021) (holding trial court commits

"procedural error by imposing a discretionary fee where it had otherwise agreed to waive such fees").

Even if not a simple clerical error, remand is still necessary. Trial courts are authorized to impose the $100 DNA fee "unless the state has previously collected the offender's DNA as a result of a prior conviction." RCW 43.43.7541. For a defendant with a prior felony conviction, the prosecution bears the burden of demonstrating that individual's DNA has not previously been collected. State v. Houck, 9 Wn. App. 2d 636, 651, 446 P.3d 646 (2019). A silent record does not suffice. Id.

The prosecution at Mr. Johnston's sentencing readily admitted it failed to carry its burden. RP 114. This Court should remand for the trial court to strike the DNA collection fee unless the prosecution can prove Mr. Johnston has not previously provided a DNA sample. Houck, 9 Wn. App. 2d at 651.

E. CONCLUSION

This Court should remand for suppression of the firearm and dismissal of the corresponding conviction. For that reason,

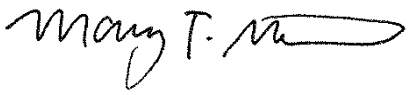
and because Mr. Johnston's guilty plea was not entered with a full understanding of the law in relation to the facts, Mr. Johnston should be allowed to withdraw his guilty plea on all three counts.

DATED this 6th day of September, 2022.

I certify this document contains 11,999 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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